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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 753

KENNETH ROMNEY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Kenneth Romney respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, District of Columbia, which Court by opinion affirmed the judgment and sentence of the District Court of the United States for the District of Columbia under an indictment charging violation of Section 80, Title 18, U. S. C. (as amended April 4, 38 c. 69, 52 Stat. 197.)

The opinion of the United States Court of Appeals for the District of Columbia (R. 408) was rendered on March 22, 1948, the Justices sitting on the case being D. Lawrence Groner, Chief Justice, Wilbur K. Miller and E. Barrett Prettyman, Associate Justices. The opinion was written by Mr. Justice Wilbur K. Miller.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Jurisdiction

Jurisdiction of this Court is invoked under Section 240 (a) of the United States Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. 347).

The petitioner contends that the decision of the United States Court of Appeals confirming the District Court of the United States for the District of Columbia violates his rights under the Fifth and Sixth Amendments to the Constitution of the United States and that said Courts and each of them erred in their construing of Statutes involved in the case.

Statement of the Case

The petitioner, Kenneth Romney, in 1925 was Cashier in the office of the Sergeant at Arms of the House of Representatives. At that time he was prevailed upon by a then member of Congress from the State of Florida, J. S. Smithwick, to invest jointly in Florida real estate. This venture at the outset realized certain limited gains but in due course because of the collapse of the Florida boom substantial losses were sustained with the result that the petitioner personally lost Twenty-five Thousand Dollars ($25,000.00) of his own cash and approximately Twenty-five Thousand Dollars ($25,000.00) in securities.

Congressman Smithwick then started a process of presenting checks to the petitioner for cashing at the Sergeant at Arms Bank, or as it was otherwise known "The House Bank". Petitioner continued to honor these checks even though several of them were returned because of lack of funds in the banks upon which they were drawn. This process was pursued under the persuasion of Congressman

Smithwick that he would be able to accomplish a recoupment of the losses sustained. In fact the Congressman indulged this operation in a manner that is familiarly known as "kiting" checks, with the result that there were over a million dollars in checks that the Congressman handled at "The House Bank". The aggregate losses to "The House Bank" as a result of the Smithwick checks was over Sixty Thousand Dollars ($60,000.00).

Later on and during a period subsequent to 1931, when the petitioner became Sergeant at Arms of the House, additional losses were sustained by "The House Bank" in an amount between twenty-five and thirty thousand dollars as a result of embezzlements by a bookkeeper named Mahoney.

Further losses were sustained by "The House Bank" as a result of bad checks which had been cashed for a former employee of the office, checks forged by a secretary to a Congressman, and bad checks cashed for a lobbyist. There were also checks drawn on the National Bank of Washington by the petitioner but never presented for payment and covering money that went to the Smithwick transactions.

"The House Bank" was a non-profit arrangement that had come into being over a period of years for the convenience of the Congressmen and was used by them when they let their compensation accumulate and otherwise deposited money as in a private bank.

Under the practice of the House of Representatives at the beginning of each session an appropriation was made to cover compensation and mileage of the members for the session. The Sergeant at Arms charged in law with paying the compensation and mileage to the membership would then make requisition on the Treasury each month to take care of the monthly payment for compensation and usually in the first month an added amount to cover mileage. The

amount so requisitioned each month would then be placed to the credit of the Sergeant at Arms in the Treasury. All the members that wanted their compensation were then paid monthly by check drawn by the Sergeant at Arms against money to his credit at the Treasury. The only way money got into "The House Bank" was because of certain of the members electing not to take their monthly pay and indicating that they desired the privilege of drawing on same through "The House Bank". The result was that the Sergeant at Arms was made the private banker of certain of the membership and check books were issued to such members.

The Government at the trial contended that the money which went into "The House Bank" in the manner aforementioned, was still property of the United States and to be reported to the General Accounting Office in the monthly accounts current.

The defense contended that the money in "The House Bank" had ceased to be property of the United States and therefore was not required to be reported to the General Accounting Office and that any reporting touching moneys in "The House Bank" was therefore a gratuitous act which could not be made the subject of a prosecution under Title 18, Section 80, which section is a part of old Section 35 of the United States Criminal Code. Each month the Sergeant at Arms signed and filed with the General Accounting Office a statement known as an account current. The reports were made on a printed form which came into being prior to the creation of the General Accounting Office and approved on September 15, 1914, by the Comptroller of the Treasury. These reports had been made by the Sergeant at Arms in a similar manner for many years.

The indictment in this case consisting of three counts

and alleging violation of Section 80, Title 18 U. S. C. (R. S. 5438 as amended by Act of April 4, 1938) was based upon a suggested false reporting in the aforementioned accounts current in that there was reported as cash the items representing the Smithwick, Mahoney and other transactions which had occasioned losses to "The House Bank".

The contention of the petitioner at the trial and before the United States Court of Appeals, District of Columbia, was that because the money in "The House Bank" was a private fund of the members using said facility, same was not money of the United States, there was no requirement for reporting as to the questioned funds and any such reporting was a gratuitous act that could not be made the basis of a prosecution under Section 80, Title 18 (*supra*). The petitioner further contended that there was no requirement in law for him, the Sergeant at Arms, to make reports to the General Accounting Office.

The petitioner contended at the trial and before the United States Court of Appeals, District of Columbia, that he had been indicted by an unconstitutional Grand Jury and in addition that he had been prejudiced by the conduct of the Trial Justice in the course of the trial.

Summary of Argument

I

The Grand Jury that returned the indictment in this cause was illegally constituted in that it was made up of volunteers for jury service and thereby denied to the petitioner his Constitutional right to have indictment returned against him (if at all) by a Grand Jury fairly drawn from a cross-section of the community.

II

(a) There was no requirement in law that the Sergeant at Arms of the House of Representatives make report to the General Accounting Office.

(b) That if it could be construed that the Sergeant at Arms was required to make report to the General Accounting Office he nevertheless was not required to report to the General Accounting Office as to money that had gone into "The House Bank".

III

The Trial Court erred in its prejudicial conduct before the jury.

ARGUMENT

The Court Erred in Overruling the Motion to Dismiss (R. 386) Because the Grand Jury That Returned the Indictment Was Illegally Constituted.

The affidavit in support of the Motion to Dismiss (R. 387) points out that the January 1947 regular Grand Jury for the District Court of the United States for the District of Columbia was selected in the manner following:

The deputy clerk of court in Criminal Court No. 1, then presided over by Mr. Chief Justice Laws, under instructions of the Court, announced to the summoned hundreds of prospective jurors that when the individual juror's name was called he or she should answer and state whether he or she desired to be excused from service. The deputy clerk then proceeded to call the names of the jurors in numerical order from the master list of summoned jurors. Each juror that indicated a desire to be excused was immediately directed to step aside without any further interrogation. This continued until there remained standing

and not having asked to be excused a sufficient number out of which twenty-three (23) were finally selected as the Grand Jury for the January term (R. 389). A study of the master list of summoned jurors (R. 390) indicates that twenty (20) asked to be excused and stepped aside before the Grand Jury was finally constituted.

The impropriety of this procedure is immediately apparent upon an examination of the identity of the Grand Jury finally selected, which had amongst its membership thirteen (13) Government employees. This represents one (1) more than is required to indict. A study of the remaining eleven (11) members of this particular Grand Jury forcibly demonstrates how lacking this particular body was in being representative of a true cross-section of the community.

Mr. Justice Schweinhaut, who heard this Motion to Dismiss, stated that he disapproved of this method of selection and did not follow such when he selected jurors. However, he overruled the Motion to Dismiss.

Mr. Justice Schweinhaut conceded as an historical fact that as a result of this particular method of selection of jurors, he had the experience of all twelve (12) petit jurors in trials before him being Government employees.

It is important to bear in mind that the excused jurors were not further interrogated and were excused (R. 406-7).

A jury selected in the manner aforesaid is not such as was contemplated under the Fifth Amendment to the Constitution of the United States and in Chapter 14, Title 11, Sections 1401-1423, D. C. Code (1940 Ed.).

This Court in recent times has pronounced with full vigor on this subject matter. In *Ballard* v. *United States*, 327 U. S. 773, 91 L. Ed. 181, a case questioning the method of selecting grand and petit jurors, this Court quoting from

Thiel v. *Southern P. Co.*, 328 U. S. 217, 66 S. Ct. 984, 90 L. Ed. 1181, said:

> "'The American Tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. • • • This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury.'"

In *Fay and Bove* v. *New York*, reported in 332 U. S. 261, 91 L. Ed. 2043, the so-called "blue ribbon" jury indulged in New York was sustained in a five to four decision. Mr. Justice Jackson who concurred in the Ballard case (*supra*) wrote the opinion and on page 287 states as follows:

> "These defendants rely heavily on arguments drawn from our decisions in *Glasser* vs. *United States*, 315 U. S. 60; *Thiel* vs. *Southern Pacific Co.*, 328 U. S. 217; and *Ballard* vs. *United States*, 329 U. S. 187. The facts in the present case are distinguishable in vital and obvious particulars from those in any of these cases. But those decisions were not constrained by any duty of deference to the authority of the State over local administration of justice. They dealt only with juries in federal courts. Over federal proceedings we may exert a supervisory power with greater freedom to reflect our notions of good policy than we may consti-

tutionally exert over proceedings in state courts, and these expressions of policy are not necessarily embodied in the concept of due process."

Again demonstrating how solicitous is this Court on this subject matter, memorandum opinion of the Court as reported in 330 U. S. 800, 91 L. Ed. 1259, states:

"No. 489, October Term 1945. Edward F. Zap, Petitioner vs. The United States of America.

"On Writ of Certiorari to the Circuit Court of Appeals for the Ninth Circuit.

"March 3, 1947. Per Curiam: The motion for leave to file a second petition for rehearing and to recall the mandate is granted. The second petition for rehearing is granted and the judgment entered June 10, 1946, and order denying rehearing entered October 21, 1946, are vacated. The judgment of the Circuit Court of Appeals is reversed and the case is remanded to the District Court with directions to dismiss the indictment. Ballard vs. United States, No. 37, October Term 1946, decided December 9, 1946 (329 U. S. 187, ante, 181, 67 S. Ct. 261). The Chief Justice and Mr. Justice Jackson took no part in the consideration or decision of this application."

It is interesting to note in the reference to this last case that the mandate had already gone to the Circuit Court and in this instance it was recalled.

As stated in *United States* v. *Roemig* (D. C. Iowa), 52 Supp. 857, 862—

"Such action is operative to destroy the basic democracy and classlessness of jury personnel."

This Court's attention is directed to page 8 of the printed opinion of the United States Court of Appeals (R. 415), wherein the Court states as follows:

"• • • Moreover, it is well established that a motion to dismiss an indictment on the ground of irregularity

> in the drawing or impaneling of the grand jury must show with exactness that the irregularity complained of tended to the movant's injury and prejudice, and that it must set out the particular respects in which it did so tend. The language of Chief Justice Groner in *Medley* vs. *United States* is applicable in this case: 'Here, nothing is shown or alleged to the damage or hurt of defendant, and without it the allegation of mere irregularity in drawing or impaneling the grand jury is not enough.' "

This statement by the lower Appellate Court is at complete variance with the pronouncement by this Court in *Ballard* v. *United States* (*supra*), wherein it is stated—at page 195—

> "But reversible error does not depend on a showing of prejudice in an individual case."

Currently this Court on April 19, 1948, granted certiorari in the case of *Frazier* v. *United States,* No. 213 Misc., new No. 750, wherein the only points of error suggested were the manner of selection of the jury panel and the fact that the petit jury was made up of all Government employees, one of whom was employed in the Treasury Department which through its Narcotic Bureau was charged with the enforcement of the narcotic laws.

The manner of selection of jurors for service was identical in both the *Frazier* case and this case and the procedure thereof is more fully set forth in this case (R. 386-391) than in the *Frazier* case (*supra*). In this connection, petitioner again points to the fact (R. 389) that of the twenty-three Grand Jurors in this case, thirteen (one more than necessary to indict) were Government employees.

See also—*Smith* v. *Texas,* 311 U. S. 128, 85 L. Ed. 84, 61 S. Ct. 164; *Glasser* v. *United States,* 315 U. S. 85, 86 L. Ed. 707, 62 S. Ct. 438; *Kotteakos* v. *United States,* 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557.

The Court Erred in Overruling the Motion to Dismiss (R. 392) and the Petitioner's Motion to Direct a Verdict of Not Guilty on all the Evidence.

The indictment in this cause, laid in three counts, charged in the first and second counts the alleged filing with the General Accounting Office of two specific false accounts current and in the third count that over a period during 1946 by trick, scheme or device the appellant did falsify and conceal by the filing of false accounts, as predicated under Title 18, Section 80, United States Code, which reads as follows:

> "§ 80. (Criminal Code, section 35 (A). Presenting false claims
>
> "Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and wilfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined nor more than $10,000 or imprisoned not more than ten years or both. (Mar. 4, 1909, c. 321 § 35, 35 Stat. 1095; Oct. 23, 1918,

c. 194, 40 Stat. 1015; June 18, 1934, c. 587, 48 Stat. 996; April 4, 1938, c. 69, 52 Stat. 197.)"

The prosecution contended that the reports were required under subparagraph Eighth of Section 72, Title 31 (Act. of July 31, 1894, c. 174, § 7, 28 Stat. 206, as amended) which reads as follows:

> "Eighth. Said office shall receive and examine all accounts of salaries and incidental expenses of the offices of the Secretary of State, the Attorney General, and the Secretary of Agriculture, and of all bureaus and offices under their direction; all accounts relating to all other business within the jurisdiction of the Department of State, Justice, and Agriculture; all accounts relating to the Foreign Service, the judiciary, United States courts, judgments of United States courts, Executive Office, Civil Service Commission, Interstate Commerce Commission, District of Columbia, Court of Claims and its judgments, Smithsonian Institution, Territorial governments, the Senate, the House of Representatives, the Public Printer, Library of Congress, Botanic Garden, and accounts of all boards, commissions, and establishments of the Government not within the jurisdiction of any of the executive departments. Said office shall certify the balances arising thereon, according to the character of the account, to the Secretary of the Senate, Clerk of the House of Representatives, Sergeant at Arms of the House of Representatives, or the Chief Officer of the executive department, commission, board, or establishment concerned."

The accounts claimed to be false and offered in evidence by the prosecution as Exhibits 13 and 22-31 are identical in form and differ only as to the month reported and the figures therein contained.

Petitioner contends that under subparagraph Eighth of Section 72, Title 31, U. S. C. (*supra*) there was no mandate requiring the petitioner as Sergeant at Arms of the House of Representatives to make report to the General Account-

ing Office. The only time the Sergeant at Arms is mentioned in this section is in the last sentence, which requires the General Accounting Office to certify balances to the Secretary of the Senate, Clerk of the House of Representatives, Sergeant at Arms of the House of Representatives, or the Chief Officer, etc.

There is specific law requiring the Sergeant at Arms of the House of Representatives to make report as follows:

Title 2, Section 80—

> "Disbursement of compensation of Members and Delegates. The moneys which have been, or may be, appropriated for the compensation and mileage of Members and Delegates shall be paid at the Treasury on requisitions drawn by the Sergeant at Arms of the House of Representatives, and shall be kept, disbursed, and accounted for by him according to law, and he shall be a disbursing officer, but he shall not be entitled to any compensation additional to the salary fixed by law. (Oct. 1, 1890, c. 1256, § 3, 26 Stat. 645.)"

Title 2, Section 84—

> "Statement of disbursements. The Sergeant at Arms of the House of Representatives shall prepare and submit to the House of Representatives, at the commencement of each regular session of Congress, a statement in writing exhibiting the several sums drawn by him pursuant to sections 78 and 80 of this title, the application and disbursement of the same, and the balance, if any, remaining in his hands. (Oct. 1, 1890, c. 1256, § 7, 26 Stat. 646.)"

The supervision of the Sergeant at Arms in the performance of his function is placed in the Committee on Accounts of the House of Representatives by Section 91, Title 2, U. S. C., reading as follows:

> "§ 91. Inquiry by Committee on Accounts of House of Representatives. It shall be the duty of the Com-

mittee on Accounts of the House of Representatives from time to time to inquire into the enforcement or violation of any of the provisions of sections 85 to 90 of this title; and for this purpose they are authorized to send for persons and papers, and to administer oaths; and they shall report to the House at least once every session their compliance with the duty herein imposed. (Mar. 3, 1901, c. 830, § 1, 31 Stat. 968.)"

That Congress was intentionally its own supervisor is demonstrated by the last paragraph of Section 97, Title 2, U. S. C., reading as follows:

"All payments made out of the contingent fund of the House of Representatives upon vouchers approved by said temporary committee on accounts shall be deemed, held, and taken, and are hereby declared to be conclusive upon all the departments and auditing officers of the Government. (Mar. 2, 1895, c. 177, § 1, 28 Stat. 768.)"

Bearing in mind Section 91, Title 2, U. S. C. (*supra*) it becomes important to consider the following provisions of the Rules of the House of Representatives:

"RULE IV

Duties of the Sergeant at Arms

"1. It shall be the duty of the Sergeant at Arms to attend the House during its sittings, to maintain order under the direction of the Speaker or Chairman, and, pending the election of a Speaker or Speaker pro temporary, under the direction of the Clerk; executes the commands of the House, and all processes issued by authority thereof, directed to him by the Speaker; keep the accounts for the pay and mileage of Members and Delegates, and pay them as provided by law."

§ 648. Sergeant at Arms enforces authority of House.

§ 649. Disburses pay and mileage of Members.

"RULE X

Of Committees

§ 669. Election of standing committees.

There shall be elected by the House at the commencement of each Congress, the following standing committees, viz: * * * 36. On Accounts, to consist of 11 members."

"RULE XI

Powers and Duties of Committees

§ 675. Jurisdiction of committees.

All proposed legislation shall be referred to the committees named in the preceding rule, as follows, viz, subjects relating—

---

721. Accounts

"36. Touching the expenditure of the contingent fund of the House, the auditing and settling of all accounts which mayy be charged therein by order of the House, the ascertaining of the travel of Members of the House and the reporting the same to the Sergeant at Arms—to the Committee on Accounts."

It is important to note that until January, 1947, the General Accounting Office under its suggested authority in Title 31, Section 72 (Eighth), over the years did nothing but certify as to balances as shown on the accounts current and concededly over the years never made an audit of the said accounts. It would seem obvious from the statutes and rules of the House of Representatives above set forth that the General Accounting Office acted on the premise that the House of Representatives was its own supervisor of accounts.

II (b)

Conceding for the purpose of this argument only that the Sergeant at Arms was in law required to make the reports in question to the General Accounting Office, then petitioner urges that the reporting as to funds that had gone into "The House Bank" was not required.

The evidence demonstrates that Congress at the beginning of each session would appropriate enough money to cover the compensation and mileage for the session; that each month the Sergeant at Arms would then draw a requisition on the Treasury in an amount to cover the monthly compensation of the members and usually at the beginning of the session an additional amount to cover mileage. The Sergeant at Arms would then pay by individual check drawn on the Treasury those members that desired such. Many of the members elected not to take their monthly checks, with the result that only part of the total monthly requisition would be paid. The balance of the monthly requisition was then placed to the credit of the Sergeant at Arms at the Treasury. The Sergeant at Arms under a practice created for the benefit of the membership and by approval of such membership would from time to time draw on the balance to his credit with the Treasury and place such sums in "The House Bank". The members who elected to use the facilities of "The House Bank" were given check books and they used same as they would any checking account in a private bank. The checks were not on the Treasury of the United States but rather on the Sergeant at Arms in his capacity as operator of a private bank for the benefit of certain of the membership. The type of check used is represented in Exhibit 15 A.

The inescapable effect of this routine was the making of the Sergeant at Arms private banker for certain of the

members of the House of Representatives. As to all the membership "The House Bank" was used as a facility for cashing checks and indulgences in this regard were allowed as to visitors to the Capitol.

There is absolutely no sanction in law for "The House Bank". It is strictly a figure conceived and brought into being years ago not by law but by uses and custom for the personal convenience of the membership of the House.

Again conceding only for the purposes of this argument that an account current by the Sergeant at Arms was required, it only contemplated that he should report as to the disbursing the compensation of the membership and that was accomplished when the members were paid by check or when the compensation of the others or any part thereof was for their convenience placed in "The House Bank."

At the trial when arguing for a directed verdict of not guilty it was urged on behalf of the petitioner that the prosecution was burdened with proving a pecuniary or property loss to the United States, as suggested in *United States* v. *Mulligan*, 59 Fed. 2d, 200, and as emphasized by the language in *United States* v. *Cohn*, 270 U. S. 339, 7 L. Ed. 616, 46 S. Ct. 251. The prosecution and the Trial Court misconceived the position of the petitioner in that they suggested that the principle in the *Mulligan* case (*supra*) had been changed by the 1940 amendment to Section 80, Title 18, as confirmed by the Supreme Court in *United States* v. *Gilliland*, 312 U. S. 806, 85 L. Ed. 595.

The petitioner reiterates that the burden of the prosecution in this case is to show a pecuniary or property loss to the United States, as indicated in the *Mulligan* and *Cohn* cases (*supra*) or, as pointed to by Chief Justice Hughes in the *Gilliland* case (*supra*) at page 93—

> "The statute was made to embrace false and fraudulent statements or representations where these were

knowingly and willfully used in documents or affidavits 'in any matter within the jurisdiction of any department or agency of the United States.' "

There being no law authorizing "The House Bank" it therefore follows that the misapplications involved in this cause were not "in any matter within the jurisdiction of any department or agency of the United States."

The Federal Courts have given many definitions of the term "public money". Generally it means funds in which the beneficial title and right are in the Government. *F. D. I. C.* v. *Tremaine,* D. C. N. Y. (1940) 37 Fed. Supp. 177.

The term "public money" does not include money held by Marshals, Clerk or other Court officers for the benefit of individual litigants. *Branch* v. *United States,* 12 Ct. Cl. 281.

Funds of a military post exchange (*Keane* v. *United States,* 272 Fed. 577), fees and emoluments of a District Court Clerk (*United States* v. *Mason,* 218 U. S. 517, 31 S. Ct. 28, 54 L. Ed. 1133, *United States* v. *Hill,* 120 U. S. 169, 30 L. Ed. 627, 7 S. Ct. Rep. 510, *United States* v. *MacMillan,* 253 U. S. 195, 64 L. Ed. 857), and C. O. D. collections (*Smyer* v. *United States,* 273 U. S. 333, 47 S. Ct. 375, 71 L. Ed. 667) are not public money.

The evidence in this case without dispute points to the fact that the moneys in "The House Bank" were as a private bank in trust for the benefit of the members. See testimony of witness Fangmeyer (R. 163-71) and testimony of witness Overholser (R. 239).

It should be borne in mind that ordinarily only duly qualified disbursing officers are entitled to draw drafts against public money. As to funds in "The House Bank", any member of the House maintaining an account could draw checks against same to the limit of his salary and

mileage credit therein. Moreover, the form of the Sergeant at Arms' bank check (Exhibit 15 A), does not indicate that the Government has any interest in the funds on deposit and, moreover, such checks were honored regularly by banking institutions and sent through the originary channels for collection.

As further enlightenment on this subject attention is directed to Title 18, U. S. C. 173, which makes it a crime of embezzlement for a disbursing officer to deposit in any place or in any manner, except as prescribed by law, any public money entrusted to him. The anomaly created by asserting that House bank cash is public money is this: A legislative body of the Federal Government has devised, consented to and acquiesced in open and notorious embezzlement by a disbursing officer elected by said body for its own purposes and for its own convenience. Title 31 U. S. C. 495 prescribes the method and place for depositing public funds not required for current expenditures.

Again, Title 2, U. S. C. 78, provides:—

> "It shall be the duty of the Sergeant at Arms . . . to keep the accounts for the pay and mileage of members and delegates, and pay them as provided by law."

With respect to salary, the law requires this to be paid at the end of each month upon execution of salary certificates. (Title 2, U. S. C., Sections 34 and 35). Thus, if House bank funds are public money, a certain portion of the membership has again conspired to compel the Sergeant at Arms to breach his clear statutory duty.

Title 2, U. S. C., Section 39, requires the Sergeant at Arms to "deduct from the monthly payments of each Member or Delegate the amount of his salary for each day that he has been absent from the . . . House . . ." The duty of actual monthly payment is clearly implied in this

statute and the reasoning set forth in the previous paragraph further applies.

At the trial of this cause the prosecution in an endeavor to support its contention that the funds in "The House Bank" were public funds, and the United States Court of Appeals, District of Columbia, in its printed opinion, page 6 (R. 413), likewise cited the case of *Crain* v. *United States*, 25 Ct. Cl. 204. The fact that this case does not support such a contention is to be found in the Court's opinion at page 220, reading as follows:

> "It must be noted that this action relates only to the salary of a member of the House of Representatives for the month of November, 1889. We emphasize this, as it appears that some members had made private deposits with the Sergeant at Arms, treating him somewhat as a banker, and some members had not drawn salary for several months, but had allowed it to accumulate in that officer's hands. Any rights arising from these transactions are not now in issue."

The Court's attention is also directed to the case of *People* v. *Pennock*, 60 N. Y. 421, in which the Court of Appeals held that the surety of a supervisor was not liable for the loss of funds of which the supervisor had taken custody but which he was not under a legal duty to hold. The funds involved consisted of money collected for the poor and should have been taken charge of by the overseer of the poor. In holding the supervisor's bond not liable, the Court said:

> "The appellant in become- surety upon the official bond of the supervisor, must be supposed to have known the law and the limit and extent of the liability which was assumed. He undertook for the accounting for and paying over of the moneys which his principal was authorized to receive in his official capacity, and of which he was the disbursing agent for the town, and not for that of which he might become the *voluntary*

custodian for others, or which might be ordered to be paid to him without authority of law." (Emphasis supplied.)

Likewise in the case of *U. S.* v. *Adams,* 24 Fed. 348, the Court points out—

> "Neither is the defendant Adams liable on his bond as collector for this loss, if at all. In carrying this money to San Francisco he was acting, not as collector, but as a carrier for the department. In contemplation of law, Collector Adams delivered—transferred—this money to Carrier Adams, at Astoria, and thereafter his duty and responsibility concerning it, as collector, ceased, and that as carrier began. His liability as carrier does not arise on his bond as collector, nor is it measured by his duty as such."

See also—

Texas and P. R. Co. v. *Pottorff,* 291 U. S. 245, 54 S. Ct. 416, 78 L. Ed. 777;
City of Marion v. *Sneeden,* 291 U. S. 262, 54 S. Ct. 421, 78 L. Ed. 787;
Hood v. *Hardesty,* 94 F. 2d 26.

Attention is also directed to Report No. 5, page 9, U. S. House Reports, Vol. 1 (51st Congress, 1st Session, 1899-90). In reference to the then shortage in the Sergeant at Arms office, a member of a select committee to investigate, Mr. Hemphill, reported as follows:

> "When notes were discounted, whether by use of the private funds of the Sergeant at Arms or of the public funds, or rediscounted at the National Metropolitan Bank, the amount of the note, less the discount, was likewise credited to the Member of Congress' account and checked out as needed.
>
> "Transactions of the character above described were of constant occurrence and it is manifest that they formed no part of the duties of the Sergeant at Arms,

and for any deficit growing out of them the Government can not be held responsible."

The deficiency in this instance was taken care of by H. R. 4539, approved April 11, 1890—51st Congress, 1st Session. Such demonstrates that the funds in "The House Bank" were not public funds; otherwise the membership without any resolution would have been compensated out of the United States Treasury.

In 1832 there was a deficiency in the same office and that likewise was taken care of by Order of the House of Representatives on June 28, 1832, as shown in House Journal, 22d Congress, 1st Session, page 1014.

Attention is also directed to House Resolution 167 (Report No. 210), which was considered and agreed to by the House of Representatives on April 1, 1947, as appears on page 3063 of the Congressional Record for April 1, 1947, 80th Congress, 1st Session, This resolution reads as follows:

> "RESOLVED, That the Sergeant at Arms of the House of Representatives is authorized and directed to protect the funds of his office by purchasing insurance, in the amount of $50,000.00, providing protection against loss with respect to such funds. Until otherwise provided by law, premiums on such insurance shall be paid out of the contingent fund of the House on vouchers signed by the Sergeant at Arms and approved by the Committee on House Administration."

This again demonstrates that the funds of "The House Bank" were in a private bank and not covered by any bond situation intended to cover the activities of the Sergeant at Arms in his official capacity.

Finally on this subject matter, the Court's attention is directed to Public Law 271—80th Congress—approved July 30, 1947, and finally referred to as Supplemental Ap-

propriations Act for the Fiscal Year Ending June 30, 1948.

On page 2 of this act under the heading House of Representatives there is found the following:

> "Salaries, Mileage, and Expenses of Members
>
> For compensation, mileage, and expense allowances due and unpaid to Members of the House of Representatives, Seventy-ninth and prior Congresses, $83,879.22."

If the money therein provided for, which is the unpaid balance of the funds herein involved, was a public fund then there would have been no necessity for the appropriation provided for in this particular act.

The foregoing considered, it is respectfully suggested to this Court that the reporting in the accounts current as to funds in "The House Bank" was a gratuitous act and not a proper basis for prosecution under Title 18, Section 80.

In this regard it is urged that there exists no sound distinction between this picture and one where an individual is charged with perjury, when the testimony given was not required in law or was not as to a material basis.

See *Hill* v. *U. S.*, 54 F. 2d 599;
Robinson v. *U. S.*, 72 U. S. App. D. C. 254;
U. S. v. *Curtis*, 107 U. S. 671, 2 S. Ct. 501, 27 L. Ed. 534;
U. S. v. *George*, 228 U. S. 14, 33 S. Ct. 412, 57 L. Ed. 712.

The Trial Court Erred in Its Prejudicial Conduct Before the Jury (R. 271-2)

This assignment is based upon the alleged prejudicial conduct of the Court as same appears on pages 271-2 of the record. The Justice had shaken his head and indulged a smile in reaction to certain testimony coming from the

witness Armbruster. The Justice when point was made as to his conduct stated (R. 271)—"Yes, I smiled at the suggestion of Mr. Solomon."

This Court's attention is first directed to the case of *Williams* v. *U. S.*, 93 F. 2d, 685, and to pronouncement therein as set forth at 687:

> "But as the authorities herein referred to point out, the harm done is not diminished where the judge, by reason of unrestrained zeal, or through inadvertence, departs from 'that attitude of distinterestedness which is the foundation of a fair and impartial trial.'"

It is pointed out in the case of *Egan* v. *U. S.*, 287 F. 958, 52 App. D. C. 384, that the Trial Judge should be so impartial in the trial of a criminal case that the jury are unable to deduct his personal convictions as to the guilt or innocence of the accused and his conduct and demeanor may be such as to deprive the accused of a fair and impartial trial even though no single instance involved error so prejudicial as to warrant reversal.

See also—

Barham v. *U. S.*, 14 F. (2d) 835;
DeGroot v. *U. S.*, 78 F. (2d) 244;
Graham v. *U. S.*, 12 F. (2d) 717;
Klose v. *U. S.*, 49 F. (2d) 177;
Kouri v. *U. S.*, 41 F. (2d) 1003;
Lett v. *U. S.*, 15 F. (2d) 686;
Malaga v. *U. S.*, 57 F. (2d) 822;
Reynolds v. *U. S.*, 98 U. S. 145, 25 L. Ed. 244;
Weare v. *U. S.*, 1 F. (2d) 617;
Withrow v. *U. S.*, 1 F. (2d) 858.

Conclusion

In the light of the foregoing it is respectfully suggested to this Court that the petitioner in this cause was indicted by an illegal and unconstitutional Grand Jury on a charge that is not supportable in law and convicted in a trial on such charge in the face of conduct by the Trial Justice that was prejudicial. For these reasons it is contended that this Honorable Court should grant the writ of certiorari herein requested so that the contentions made can be fully considered and a determination had as to the legality of the conviction herein involved.

Respectfully submitted,

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